STATE OF MICHIGAN

COURT OF APPEALS

THE LEFKO GROUP,

Plaintiff-Appellant,

v

THERESA S. GONZALEZ and GARY H. GONZALEZ,

Defendants-Appellees.

UNPUBLISHED
January 19, 1999

No. 203669
Oakland Circuit Court
LC No. 97-541160 CK

Before: Smolenski, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Plaintiff The Lefko Group appeals as of right from the entry of a $5000 judgment in its favor. We reverse and remand.

In order to settle a claim, plaintiff and defendant Theresa S. Gonzalez entered into an agreement that provided, in relevant part, as follows:

> 4. As of August 31, 1996, the outstanding balance owed Lefko by Gonzalez is $44,699.57 which continues to accrue interest.
>
> 5. In consideration of the execution of this Agreement, Gonzalez shall pay to Lefko $35,000 as set forth below:
>
> | | | |
> |---|---|---|
> | (a) Upon execution of this Agreement | $10,000.00 | |
> | (b) December 1, 1996 | $10,000.00 | |
> | (c) January 1, 1997 | | $10,000.00 |
> | (d) February 1, 1997 | | $5.000.00 |
>
> This payment plan becomes effective immediately upon the execution of this Agreement. All payments beginning with the December 1, 1996 payment shall be made payable to Mark D. Evans, P.C. as counsel for Lefko and delivered to 1533 North Woodward Avenue, Suite 330, Bloomfield Hills, Michigan 48304. In addition, the

parties hereto agree that time is of the essence in connection with the payments required hereunder. . . .

6. In the event that Gonzalez fails to timely pay any installment of the $35,000 according to the above schedule, time being of the essence, Gonzalez shall pay Lefko the sum of $44,699.57 plus interest from and after August 31, 1996 at the applicable statutory rate for judgments entered in the courts of the State of Michigan as of August 31, 1996 less any payments actually received by Lefko under this Agreement.

7. In the event Gonzalez fails to timely pay the $35,000 according to the above schedule, time being of the essence, Gonzalez by virtue of this Agreement:

* * *

(c) authorizes the entry of a consent judgment in the amounts described in paragraph 7 above plus any and all amounts incurred and/or expended by Lefko in attempting to collect these amounts including but not limited to attorney fees from and after August 31, 1996.

* * *

17. **NO WAIVER.** No Waiver of any breach of any term or provision of this Agreement shall be construed to be, nor shall be, a waiver of any other breach of this Agreement. No waiver shall be binding unless in writing and signed by the party waiving the breach.

Defendant timely made the payment due upon the execution of the agreement. Defendant apparently attempted to deliver the Sunday, December 1, 1996, payment to plaintiff's counsel's office on Friday, November 29, 1996. However, the office was closed. Defendant left plaintiff a voice-mail message indicating that she had attempted to timely make the payment and plaintiff accepted this payment on Monday, December 2, 1996.

Defendant delivered the January 1, 1997, payment to plaintiff's counsel's office on December 31, 1996. However, plaintiff did not deliver the Saturday, February 1, 1997, payment to plaintiff's counsel's office until Monday, February 3, 1997. Defendant was advised that the payment was untimely and would not be accepted. Plaintiff began an action for the entry of a consent judgment in the amount of $14,699.57 plus statutory interest and attorneys fees. The trial court ultimately entered a $5000 judgment in plaintiff's favor.

On appeal, plaintiff argues that the trial court erred in entering judgment for the amount of the late payment instead of for the amount agreed upon by the parties in the event of an untimely payment. We agree.

The construction of unambiguous language in a contract is a question of law that this Court reviews de novo. *State Farm Fire & Casualty Co v Couvier*, 227 Mich App 271, 273; 575 NW2d

331(1998). The language of a contract should be given its ordinary and plain meaning. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). Moreover, this Court can neither make a new agreement for the parties nor, by addition, give it a meaning

contrary to its express and unambiguous terms. *Stein v Continental Casualty Co*, 110 Mich App 410, 418; 313 NW2d 299 (1981). "Where it is the clear intent of the parties to make time of the essence, the stipulation as to time must be observed, whether such be specified in terms of a particular hour or day." *Nedelman v Meininger*, 24 Mich App 64, 74; 180 NW2d 37 (1970).

This Court finds the contractual language clear. The phrase "time is of essence" was expressly used several times in the contract with respect to the timeliness of the payments. The parties easily could have ascertained that the payment due dates fell on nonbusiness days and modified these dates accordingly. Instead, the parties expressly agreed that time was of the essence and that payment was due on the nonbusiness day of February 1, 1997. To hold otherwise would give the agreement a meaning contrary to its express and unambiguous terms. This we will not do.

Moreover, the facts of this case show that defendant realized time was of the essence and it is not unconscionable or unreasonable to enforce the terms of the contract. When defendant attempted to make the Sunday, December 1, 1996, payment and no one was present at plaintiff's attorney's office to accept the payment, defendant left plaintiff a voice-mail message indicating that she had attempted to make a timely payment and then promptly made the payment on Monday. In addition, defendant delivered the January payment early to ensure that, despite the holidays, it was timely. We find that it was not unconscionable or unreasonable for the parties to have agreed for payment to be made on Saturday, February 1, 1997, and the contract should be enforced as written.

Defendants argue that MCL 435.101; MSA 18.861 should be applied to the settlement agreement to make the payment due on Monday, February 3, 1997. However, MCL 435.101; MSA 18.861 does not apply in this case because the parties specifically agreed that the payment was due on February 1, 1997, and MCL 435.101; MSA 18.861 specifically relates to the "presenting for payment or acceptance, and the protesting and giving notice of the dishonor of bills of exchange, bank checks, and promissory notes." We conclude that the payments required by the settlement agreement do not fall under MCL 435.101; MSA 18.861.

Reversed and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald